Press can do better than knee-jerk response on White House memo

Maybe my kids are right and I'm getting more conservative as I get older. Maybe my ACLU buddies have reason to wonder if I've strayed from the path of founder Roger Baldwin. Or maybe it's been too many years since I was in the White House press room.

But as I listened this week to the White House press briefing, I was irritated by the press' attitude that President Obama's decision to kill any American citizens plotting attacks on the United States was comparable to President George W. Bush's authorization of the torture of captured al-Qaida operatives.

In my former life as an editorial writer for the Post-Dispatch, I wrote reams of editorials criticizing the Bush administration for its use of "enhanced interrogation techniques" – aka torture.

In 2002, Jay Bybee, head of the Office of Legal Counsel in the Ashcroft Justice Department, wrote a torture memo that still sickens me.

Bybee wrote that some "cruel, inhuman or degrading acts" might not produce enough pain to meet the definition of torture. To be illegal, he argued, actions had to produce "serious physical injury, such as organ failure, impairment of bodily function, or even death." Additionally, an interrogator would have to be certain that his techniques would cause severe pain and suffering, Bybee wrote. A mere kick in the stomach of a kneeling prisoner would not suffice. And even if an interrogator tortured a prisoner, he still might avoid prosecution by claiming he acted only out of "necessity" or in "self-defense."

The Justice Department white paper disclosed this week by NBC is nothing like the Bybee memo, nor is the targeted killing of an al-Qaida operative anything like the decision to torture a captured prisoner.

The memo is a well-reasoned, constitutionally sound defense of the president's power as commander-in-chief to order a drone attack on an American citizen who has taken up with the enemy and is plotting to kill Americans.

I wonder how many Americans would disagree with the conclusion that the president can use "lethal force in a foreign country outside the area of hostile activities against a U.S. citizen who is a senior operational leader of al-Qaida" when that leader is "actively engaged in planning operations to kill Americans."

Before the U.S. could attack, a senior U.S. official would have to determine that the "individual poses an imminent threat of violent attack against the United States" and that capture was "infeasible."

Reporters and commentators made a big deal about the way the memo defined "imminent threat." It said that the United States did not have to have "clear evidence that a specific attack on U.S. persons or interests will take place in the immediate future."

Few reporters explained the rationale for this argument. The memo pointed out that a requirement of clear evidence of a specific attack would have prevented the United States from acting in the period before 9/11 because U.S. officials had no such hard evidence then. So a requirement of hard evidence of an imminent attack would require "the United States to refrain from action until preparations for an attack are concluded."

The United States might lose track of the location of an al-Qaida operative if it had to wait until the days right before an attack was launched.

The memo recognizes that an American citizen has due-process rights under the Constitution and bases its legal reasoning on the U.S. Supreme Court decision that limited the Bush administration's handling of American citizens involved with the Taliban.

But it points out that when an American citizen takes up arms with an enemy, due process of law does not save him from being targeted on the battlefield. That has been the law from the Civil War on through World War II and until today. No one would argue that due process requires that the military give a Miranda warning to a citizen who has taken up arms against the United States and is planning an attack.

Don't forget that Anwar al-Awlaki, the cleric killed in an American drone strike in Yemen in September 2011, had trained and motivated the "underwear bomber" who came close to detonating a bomb on Flight 253 over Detroit on Christmas Day 2009. Farouk Abdulmutallab told federal agents it was Awlaki who personally helped film a "martyrdom video" and directed him to carry out the suicide mission on a U.S. plane over U.S. soil.

After 9/11, Congress authorized the president to take all actions necessary to defeat al-Qaida. The president, as commander-in-chief, has the constitutional power to direct lethal force at enemy combatants plotting attacks on the United States, even if those combatants are American citizens.

Sen. Diane Feinstein, D-Calif., said this week that she would pursue the possibility of setting up a court to review decisions to target U.S. citizens who have taken up arms against the United States. She analogized this to the Foreign Intelligence Surveillance Court, which authorizes secret wiretaps.

This solution sounds on the face like a golden compromise. But, as the Obama memo states, courts have no business second-

guessing the battlefield decisions of the commander-in-chief. For courts to second-guess a decision to mount an attack on the enemy would violate the separation of powers of the Constitution.

Call me old. Call me a fallen civil libertarian. Call me an Obama lover. But I would like to see the press exhibit something more than a knee-jerk response that creates a false equivalency between drone strikes on al-Qaida operatives and the torture of al-Qaida prisoners in U.S. custody.